Office Supreme Court, U. S.
FILED.
JAN 26 1907
JAMES H. McKENNEY,
CLERK.

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,
vs.
HYMAN GREENBERG,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

WILLIAM G. BURKE,
Attorney for Defendant in Error.

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,
vs.
HYMAN GREENBERG,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

This action was commenced in the Superior Court of the City and County of San Francisco, State of California, by the defendant in error, against the plaintiff in error, to recover the sum of $10,100. damages alleged to have been sustained by defendant in error, by reason of an unlawful assault made upon him by the employees of the plaintiff in error, as a result of which he sustained the

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,

vs.

HYMAN GREENBERG,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

This action was commenced in the Superior Court of the City and County of San Francisco, State of California, by the defendant in error, against the plaintiff in error, to recover the sum of $10,100. damages alleged to have been sustained by defendant in error, by reason of an unlawful assault made upon him by the employees of the plaintiff in error, as a result of which he sustained the

severe injuries described in his complaint and proven upon the trial. (Record, pp. 8-9.)

A verdict was rendered in favor of the defendant in error for the sum of $1,000.00, upon which judgment was entered. From this judgment, and from an order subsequently made by the trial court denying its motion for new trial, plaintiff in error appealed to the Supreme Court of the State of California, by which court the judgment and order appealed from were affirmed. (Record, pp. 11; 32-36.) From the judgment rendered by the Supreme Court, a writ of error has been prosecuted to this court.

The sole question to be determined by this Court is whether a certain act passed by the Legislature of the State of California on the 23d day of March, 1893, a copy of which is set forth in the brief filed on behalf of plaintiff in error, is constitutional.

FACTS.

It is alleged in the complaint filed by the defendant in error that the plaintiff in error was and is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, and that at all of the times therein mentioned it was and is the owner and proprietor of a certain race-course, situate in the County of

San Mateo, State of California, known and designated as "Tanforan Park".

It is also alleged in said complaint

"That on the 3rd day of January, 1900, said de-
" fendant was engaged in managing and conduct-
" ing said race-course as a place of *public entertain-*
" *ment and amusement.*" (Record, p. 8.)

In the answer filed by the plaintiff in error to said complaint, while it is denied that it is the proprietor of said race-course, it admits that at all of said times it was and is the lessee and in possession thereof, and expressly admits, by failure to deny, that on the date in question it was managing and conducting said race-course as a *place of public entertainment and amusement.* (Fol. 17.)

It will, therefore, be seen by the Court that it is an admitted fact in this case that the race-course from which plaintiff in error undertook to and did exclude the defendant in error was being operated and conducted by plaintiff in error as a place of *public* amusement and entertainment.

On the 3rd day of January, 1900, the defendant in error, then a young man, conceded by plaintiff in error, in the pleadings, to be of good moral character, and who was connected with the "Evening Bulletin", one of the newspapers published and circulated in San Francisco, purchased a ticket of admission to the race-course maintained by the plaintiff in error at Tanforan, for the purpose of

witnessing the races which were to be conducted therein on the afternoon of that day. Upon presenting the ticket at one of the gates he was admitted to the track. He then walked up to the Judges' stand, where he engaged in conversation with several people, among whom were some of the officials of the race-track. While thus engaged in conversation, and in the presence of some three or four thousand people, with many of whom he was acquainted, two of the employees of the plaintiff in error, without a word of warning to defendant in error, took hold of him with great force and dragged him through the crowd and out of the track to a point distant 200 feet from its entrance. During this assault they tore his clothes, bruised and dazed him, cut his neck, and injured him generally. (Record, pp. 13, 20.)

It is suggested in the brief filed by plaintiff in error that the reason for excluding the defendant in error from the grounds was because he insisted upon publishing a racing chart or form chart, the privileges for publishing which had been sold by the plaintiff in error to some other persons. The record in this case is absolutely barren of any suggestion, establishing such to be the fact. In fact, the testimony practically without contradiction shows that although the defendant in error had been upon former occasions excluded from the race-course, he had been informed by the officials connected with the Secretary's office that this order

of exclusion was no longer in force and that he would be permitted to go upon the track whenever he saw fit. (Record, pp. 13-14-15.)

It was also suggested that before expelling the defendant in error from the track the purchase price of the ticket was tendered to him and he was requested to leave. While this was the contention of the plaintiff in error, it was positively denied by the defendant in error and some of his witnesses. (Record, pp. 14-15.)

ARGUMENT.

It will be observed by the Court from a reading of the Statute claimed to be unconstitutional that it is applicable only to places of *public* amusement or entertainment.

Section 1 of the Statute is as follows:

> "Section 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of *public amusement or entertainment*, to refuse admittance. * * *"

As we have already shown, it is admitted in the pleadings by plaintiff in error that it was managing and conducting the race-course from which defendant in error was excluded, as a place of *public* amusement and entertainment.

The question to be determined then resolves itself into this proposition: Has the Legislature of a State the right to supervise or regulate the conduct of a place of *public* amusement or entertainment? That it possesses such right, and that, therefore, the statute in question is constitutional, has been so frequently determined that it is now no longer open to further controversy.

The case of

Munn v. People of Illinois, 94 U. S. 113.

is a leading case upon this subject. The State of Illinois had passed a statute fixing the maximum of charges for the storage of grain in certain warehouses in that State in which grain was stored in bulk and in which the grain of different owners was mixed together. It was claimed on the part of the plaintiff in error that the law was unconstitutional, among other reasons, as being repugnant to the 14th amendment of the Constitution of the United States. In upholding the constitutionality of the act, this court held that when private property is devoted to a public use it is subject to public regulation, and after citing many cases, Mr. Chief Justice Waite, who delivered the opinion of the court, said:

> "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.
>
> "It matters not in this case that these plaintiffs in error had built their warehouses and

established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on, subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted. * * *

"We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment."

This case has been frequently followed by this Court in many decisions, all of which are so familiar to the Court, that it is unnecessary to cite them in this brief.

Speaking with reference to the character of places of public amusement, Mr. Justice Harlan, in his dissenting opinion in the

Civil Rights Cases, 109 U. S. 3-62,

said:

"As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the pub-

lic are, in any legal sense, concerned, or with which the public have any right to interfere; and that the exclusion of a black man from a place of public amusement on account of his race, or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer is, that places of public amusement, within the meaning of the Act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be —which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude."

The identical question under consideration here was decided by the Appellate Court of New York, adversely to the contention of the plaintiff in error, in the case of

Grannan v. Westchester Racing Assn., 16 App. Div. 8, 44 N. Y. Sup. 790.

That was an action to declare null and void a certain resolution of the defendant Jockey Club, and to enjoin defendants from enforcing such resolution

against plaintiff and from depriving him of any of the privileges enjoyed by the public at the various meetings by the stewards of the Jockey Club. The lower Court denied an injunction, *pendente lite*, from which order the plaintiff appealed.

In reversing the order made by the lower Court, after setting forth the facts showing that the plaintiff had purchased a ticket of admission to the racecourse, that he was refused admission thereto and excluded therefrom, the Court said:

> * * * "It is therefore plain that it is the purpose and policy of the State to control and regulate the business of racing, and to invest the association which shall so engage therein with quasi public functions; the State exercising control and supervision by means of a commission, and in certain respects through other officers of the State. This is the clear legal effect of the provisions of the act, and is also in accordance with its spirit and intent. What circumstances will serve to impress upon private property a public interest is not at all times clear. But, within certain well-defined lines, we may say that property is affected with a public interest, although beyond these limits the right is doubtful, and finally fades away in the imperceptible dividing line. The case, however, is clear enough, as is said by Judge Cooley, 'if one is permitted to take upon himself a public employment, with special privileges, which only the State can confer upon him.' Cooley, Const. Lim. 736. And the learned author further says that property in business is affected with a public interest 'where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise'.

Id. 738. Under this head he groups the case of toll bridges, and other public franchises of like character. As we have before remarked, the franchise enjoyed by the Westchester Racing Association falls within this classification, and in this respect the case is plain, beyond doubt. Indeed, the clear settlement of the right of the public in respect to private property devoted to public use reaches far beyond the limits of the present case. *Property essentially private property, used in connection with no franchise derived from the State when devoted to public use, as it effects the public at large, becomes clothed with a public use, which continues so long as the devotion and use are continued.* This is the effect of the decision in the Munn case, 94 U. S. 119, and the decisions of our own courts. (Citing *People v. Budd*, 117 N. Y. 1.) This rule was extended to embrace a skating rink, although concededly the owner of the rink derived no special privilege or protection from the State, and no right existed in the public, in any legal sense, to resort thereto. (Citing *People v. King*, 110 N. Y. 418.) This principle becomes important here, when we shall come to consider the public obligation assumed by the racing association in this case, and the right of individuals composing the public in connection therewith. The distinction which exists between a corporation which is private, and which conducts a private business, and one which receives a special privilege and franchise from the State, is clearly pointed out by Mr. Justice Cullen in *People v. Association*, 41 Hun. 439. In the case of a private corporation, the only franchise which it obtains is the franchise to be a corporation. But the business which may be carried on by it is not other or different than that which might have been carried on by a partnership or by an individual without the aid of an act of the legislature. In the case of

a quasi public corporation, its right to existence and to carry on its business is derived solely from the act which creates it, and does not permit of its being done otherwise. * * * It is also the averment of the complaint that the defendant the Westchester Racing Association holds at its race track in Westchester County public meetings, at which regular running races are advertised, and to which the general public are invited, and admitted upon payment of the regular entrance fee. *So that it appears that not only is the public function impressed upon the association by virtue of the Statute, but in recognition thereof, and for its own purposes, it holds itself out as conducting its business for the benefit of the public.* Whether it be for the amusement of the public or its profit, or both, is of little consequence, as the association assumes to do what the policy of the State provided it should do. This being its character, and its conduct fulfilling the public expectation, what are its obligations to the public generally, and to the plaintiff as one of the public?"

And after calling attention to the duty which the Racing Association owes to the general public, it is said:

"There is, however, another conclusive answer to the contention of the defendants. By the provisions of chapter 1042, Laws 1895, it is provided that all persons within the jurisdiction of the State shall be entitled to full and equal privileges in all places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens. It is plain that the racing of horses is in the nature of an amusement. As we have seen, the property and place where such races are conducted, have become clothed with

public interest, and the Association, by reason of its franchise from the State, is under the public obligation to conduct its business for the benefit of the public, in pursuance of the obligation thereby created to fulfill the purpose of its existence. This implies that its gates shall be open to all citizens and its property subject to use by all who desire to go thereon, and who comply with its reasonable rules and regulations. The first section of the Civil Rights Act is absolute in its declaration of right, and is not qualified by anything contained in its subsequent sections. Its declaration is that all persons shall be entitled to the privilege, subject only to the conditions and limitations established by law. The second section provides a penalty for denial of any of the provisions of the first section. * * * By the law of the land, as we have seen, it is the absolute right of any citizen who conducts himself properly, and who complies with the reasonable rules of the public corporation, to enjoy the benefits secured to him thereby; and it is beyond the power of such an association to provide by any rule for the permanent exclusion of any citizen from such place, or exclude him from participation in its benefits. The argument of the learned counsel for the defendants, that the corporation has the right to exclude by a rule which operates upon all citizens alike, cannot be sustained, as, if followed out to its logical result, it might be made to operate to the exclusion of all citizens. * * * We have already considered the law and its limitations. It requires corporations of this character to admit all persons who present themselves in fit condition, demean themselves properly, and who comply with the reasonable rules and regulations. And this question is determined by the condition of the person at the time when he demands the right. The denial

of such right to a person so situated becomes, therefore, a violation of this Statute." * * *

In the case *Baylies v. Curry,* 128 Ill., 287, the appellee, who was a colored woman, applied for tickets to defendant's theatre, which were refused. She then had a white man obtain the tickets and she and her husband entered the theatre, where they were refused seats. Their money was returned to them, and she and her husband went away.

Appellant in that case on the trial offered to prove that, in order to avoid collision between the races, he had adopted a rule to the effect that the colored people should have one row to themselves in each part of the house, or as many rows as the tickets which they bought would call for, which evidence was rejected by the Court. He also offered to prove that it was a rule of his theatre that colored persons were given the same advantages in all parts of the theatre, except that they were assigned to particular rows of seats, which evidence was also rejected.

The defendant also requested the Court to give to the jury the following instructions, viz.:

"The jury are instructed that the defendants "were legally justified in assigning colored persons "to seats in the theatre of defendant Baylies, "separate and apart from the seats of white per- "sons, provided the seats to which such colored "persons were assigned were equally comfortable "and well situated.

"You are instructed as a matter of law that the "proprietor or manager of a theatre has the right "to make such reasonable rules as he may see fit "regarding the seating of the occupants of his "theatre, or the disposition, arrangement or classi- "fication of tickets sold to different persons. "* * * "

Both instructions were refused by the Court.

On appeal the Court said:

> "The rule requiring colored persons to sit in the same row, separate and apart from white people, manifestly had no tendency to justify either of these exclusions.
>
> "Beyond all question, Sections 1 and 2 of the 'Act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same', approved June 10, 1885, prohibit the denial of access to the theatre, and to the several circles or grades of seats therein, because of a race or color, for such is, in effect, the language employed. Section 1 says: 'All persons within the jurisdiction of said State shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of * * * theatres. * * *' Section 2 says: 'Any person who shall violate any of the provisions of the foregoing section, by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated * * *' It would be difficult to employ more comprehensive and sweeping language to abolish all distinctions in accommodations, facilities, privileges or advantages in theatres on account of race or color

than that thus employed. But it is enough for the present that it includes denial of access to the theatres, and denial to the first balcony of the theatre, and that it is not contended, nor in our opinion can it reasonably be contended, that these sections are inoperative by reason of repugnance to provisions of the Constitution of this State or of the United States."

The case of *People v. King,* 110 N. Y. 418 (18 N. E., 245), is peculiarly in point.

Section 283 of the Penal Code declares that:

"No citizen of this State can, by reason of race, color or previous condition of servitude be excluded from the equal enjoyment of any accommodations, facilities or privileges furnished by innkeepers or common carriers, or by owners, manager or lessees of theatres or other places of amusement. * * *"

The violation of this section is made a misdemeanor.

The defendant and one Scott were the owners and proprietors of a skating rink, and prior to June 13, 1884, announced in the public press that the rink would be opened on the evening of that day and an exhibition of roller skating would be given. Several hundred people attended the exhibition. During the evening three colored men made application for tickets, which were refused. King, having been indicted under the statute and convicted, appealed.

In affirming the judgment of the lower Court, the Court used the following language:

"* * * The real question in the case arises upon the contention of the counsel for the appellant that the statute upon which the indictment is founded, *so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, color or previous condition of servitude, is an unconstitutional interference with private rights in that it restricts the owner of property in respect to its lawful use and as to an incident which is not a legitimate matter of regulation by law.* The legislation in question is not without precedent. The Act of Congress of March 1, 1875, entitled 'An act to protect all persons in their civil rights' (18 U. S. St. at large, 335), contains a section identical in import with Section 383 of the Penal Code, except that it is still broader in its scope, and secures, not to citizens only, but to all persons within the jurisdiction of the United States, the equal enjoyment of the accommodation, advantages, facilities and privileges of * * * theatres and other places of public amusement * * * (Citing other instances.)

"It is not necessary at this day to enter into any argument to prove that the clause in the Bill of Rights that no person shall 'be deprived of life, liberty or property without due process of law', is to have a large and liberal interpretation, and that the fundamental principle of free government expressed in these words protects not only life, liberty and property in a strict and technical sense against unlawful invasion by the government in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights. * * *

"This legislation is under what, for lack of better name, is called the 'police power of the State'—a power incapable of exact definition,

but the existence of which is essential to every well-ordered government. By means of this power the Legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community; and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts cannot interfere. *In short, the police power covers a wide range of particular, unexpressed powers reserved to the State, affecting wisdom of action, personal conduct and the use and control of property.* * * *

"It is evident that to exclude colored people from places of public resort on account of their race is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, *and to equal enjoyment of privileges of a quasi-public character.* The law in question cannot be set aside, then, because it has no basis in the public interest; and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the Legislature is the sole judge, and a law will not be held invalid because, in the judgment of a court, its enactment was expedient or unwise.

"The final question, therefore, is, Does the law in question invade this right of property, protected by the Constitution? * * * Can

the State impose upon individuals having *places of public resort* the same restriction which the Federal Constitution places upon the State? It is not claimed that that part of the statute giving to colored people equal rights at the hands of inn-keepers and common carriers is an infraction of the Constitution. But the business of an inn-keeper or common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the State. By the common law, inn-keepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them so to do. *The business of conducting a theatre or place of public amusement is also a private business, in which any one may engage in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.* * * *?*

"In the judgment of the Legislature, the public had an interest to prevent race discrimination between citizens on the part of persons maintaining places of public amusement; and the *quasi-public use to which the owner of such a place devoted his property gives the Legislature a right to interfere.* * * * The Statute does not interfere with private entertainments, or prevent persons not engaged in the business of keeping a place of *public* amusement from regulating admission to an entertainment given for a social, public, or private purpose as they may deem best; nor does it seek to compel social equality. It was, we think, a valid exercise of

> the police power of the State over a subject within the cognizance of the Legislature. The judgment should be affirmed."

In the case of

Messenger v. State, 41 N. W. 638,

the defendant, who kept a barber shop, was indicted for refusing to shave a negro. Upon appeal from the judgment of conviction, the Court said:

> "In 1885, the Legislature passed 'An act to provide that all citizens shall be entitled to the same civil rights, and to punish all persons for violation of its provisions'. Section 1 provides that 'All persons within this State shall be entitled to the full and equal enjoyment of the accomodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theatres and other places of amusement. * *

Section 2 provides for the penalty. * * *

> "There is no doubt of the authority of the State to prevent discrimination against certain individuals or races because of their color or previous condition. A barber, by opening up a shop and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The Statute will not permit him to say to one: 'You are a slave, or a son of a slave! Therefore, I will not shave you. * * The authority of the State to prohibit discrimination on account of color in places of public resort, as a barber shop, is undoubted. * * *"

It is suggested in the brief filed on behalf of the plaintiff in error that the cases based upon the Civil

Rights Act are not applicable because the basis of the right asserted in those cases was not the right of access to a theatre, but the right to be free from discrimination on account of race, color or previous condition of servitude. In making this statement the learned counsel is in error. If a person conducting a place of public amusement or entertainment has an absolute right to exclude therefrom any person whom he sees fit to exclude, he would have as much right to exclude a colored person as he would to exclude a white man. And if he has no right to exclude a colored person, not alone because of the Civil Rights Act, but because the State, in the exercise of its "*police power*", has authority to regulate the conduct of a place of *public* amusement and entertainment, he has no right to exclude therefrom a white citizen or any other person.

The constitutionality of the Statute under consideration has been twice upheld by the Supreme Court of California.

In its last decision, rendered by the Court sitting in Bank, and from which decision this writ of error is presented, Mr. Justice Henshaw, speaking for the Court, in a well considered opinion said:

> "It is next contended that the act under which plaintiff sought his recovery is unconstitutional, and in this regard it is insisted that the construction put upon the act in 140 Cal. 357, 73 Pac. 1050, is erroneous. Herein appellant contends that the statute is in contravention of the fourteenth amendment to the Constitution of the United States, and Section 1 of the Declar-

ation of Rights of the State of California, and this court is asked to reconsider the construction which heretofore it has put upon the Act. The argument of appellant in this respect seems to be that as at common law the purchaser of a ticket to a place of amusement held only a revocable license, and the proprietor of such a place of amusement could either refuse the holder of the ticket admission, or eject him after admission, not being responsible in court, but merely in contract, for the price of the ticket, and the necessary expenses incurred by the purchaser, no subsequent legislation by the State can modify this common law rule, except in one particular, and that is, that the exclusion cannot be by way of race discrimination, and because of 'race, color, or previous condition of servitude', and that, as the Act in question is not designed to meet this condition, or to effectuate this end, it is an unwarranted invasion of the rights which the defendant enjoyed before the passage of the Act under the rule as it existed at common law. If the right of State legislatures to pass an Act such as this rested upon the proposition enunciated, the acts themselves would be of no value, for, as pointed out in the note to McCrea v. Marsh, 71 Am. Dec. 745: 'The States might pass such laws, but, if a ticket to a theatre is but a revocable license, they would be of little effect as, if the theatre proprietor desired to exclude colored persons, he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race, color, or previous condition of servitude'. The truth of the matter is that the right of the State rests upon no such flimsy foundation. It is based upon its fundamental right, when not acting in contravention to its constitution or to the constitution of the United States, to modify the common law. As is said in Charge to Grand Jury, 1 Hughes,

> 541, Fed. Cas. No. 18,258, 'A State has the Constitutional and legislative power to change or modify the common law, and by Statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, &c.' As pointed out in 1 Dillon, Municipal Corporations (4th Ed.) §357: 'Charges not infrequently confer upon the corporation the power to 'license and regulate' or to license, regulate, and tax 'certain vocations and enjoyments, and to 'tax and restrain' or 'prohibit' exhibitions, shows, places of amusement, and the like, and, unless there is some specified limitation on the authority of the Legislature in this respect, such provisions are constitutional.' The State, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power and not at all as having to do with civil rights, that the Act in question was upheld in 140 Cal. and 73 Pac., and its constitutionality is here again affirmed."
>
> *Greenberg v. Western Turf Assn.*, 82 Pac. 684.

See also

> *Greenberg v. Western Turf Assn.*, 140 Cal. 360,

being the first decision rendered in Department.

Upon these two decisions alone defendant in error could with absolute confidence as to the result, rest his cause.

In conclusion, we desire to suggest that it is universally known that the conduct of the business in which plaintiff in error is engaged, as to the places in which and times when races may be held, is

regulated by Statute or Ordinance in almost every State in the Union. In San Francisco, for illustration, races can only be run at the Ingleside Tract and then only for a few weeks each year. In fact, in many communities, racing, as a form of public amusement, is entirely prohibited.

If Statutes and Ordinances, such as these, do not violate any provision of the Constitution, which must be conceded, it cannot be successfully contended that the Statute made the subject of attack here is unconstitutional.

For the considerations stated, it is respectfully submitted that the Act in question contravenes neither the language nor the spirit of any provision of the Federal Constitution, and that the judgment from which this writ of error is prosecuted, should be affirmed.

Dated, Jan. 14th, 1907.

Respectfully submitted,

WILLIAM G. BURKE,
Attorney for Defendant in Error.